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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. ARNOLDO JUAREZ, Defendant and Appellant.	C058909 (Super. Ct. No. 04-7021)

In retaliation for injuries inflicted on defendant in a fight with Victor Ayala and David Jauregui, defendant and Jose Perez committed drive-by shootings at the Ayala and Jauregui residences. Convicted of 11 counts of attempted premeditated murder, with gang and firearm use enhancements, and two counts of shooting at an inhabited dwelling for the benefit of a criminal street gang, defendant was sentenced to a long determinate term and multiple life terms in state prison.

On appeal, defendant contends that (1) the jury instructions allowed the jury to convict defendant of attempted

murder without finding express malice, (2) use of the term "kill zone" in the jury instructions violated his due process rights, (3) the court erred in not defining the term "kill zone," (4) the trial court improperly admitted statements of a codefendant, (5) there was insufficient evidence to sustain the gang enhancements, (6) the court erred by not giving accomplice instructions, and (7) the award of presentence custody credits must be modified to give defendant credit for one additional day.

We conclude that the last contention has merit and therefore order the judgment modified accordingly. Otherwise, we find no prejudicial error. Therefore, we affirm the judgment, as modified.

PROCEDURE

The district attorney charged defendant by information with 11 counts of attempted murder in connection with the Ayala (counts 1-6) and Jauregui (counts 8-12) drive-by shootings. (Pen. Code, §§ 21a; 187, subd. (a); 664, subd. (a).) As to each attempted murder count, the information alleged that (1) the attempted murder was willful, deliberate, and premeditated (Pen. Code, § 664, subd. (a)); (2) the crime was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)); and (3) a principal personally discharged a firearm during the commission of the crime (Pen. Code, § 12022.53, subds. (c) & (e)(1)(A)).

In addition to the 11 attempted murder counts, the district attorney charged defendant in counts 7 (Ayala residence) and 13

(Jauregui residence) with shooting at an inhabited dwelling. (Pen. Code, § 246.) The information also alleged that the crimes of shooting at an inhabited dwelling were committed for the benefit of a criminal street gang. (Pen. Code, § 186.22, subd. (b)(4)).

Defendant was charged together with Jose Perez. However, Perez pled guilty to being an accessory (Pen. Code, § 32) and, in conjunction with another case, was sentenced to seven years four months in state prison. Although he had already been convicted and sentenced for his role in the crimes charged against defendant, Perez refused to answer questions at defendant's trial.

A jury convicted on all counts and found all enhancement allegations true.

The trial court sentenced defendant to consecutive indeterminate terms of seven years to life for the 11 attempted murder counts plus 20 years for the firearm enhancement for each of those counts. The court stayed the gang enhancements and the two counts for shooting at an inhabited dwelling. The total sentence imposed was a determinate term of 220 years, plus a consecutive indeterminate term of 77 years to life.

FACTS

In addition to the two charged drive-by shootings, the facts relevant to this case include a fight in 2001 during which defendant was injured, as well as two uncharged drive-by shootings. We recount the incidents in chronological order and

provide a summary of the investigation that led to defendant's conviction.

2001 Incident

In 2001, Victor Ayala and David Jauregui were members of the Brown Pride gang, a subset of the Sureños, in Woodland. One evening, Ayala and Jauregui were at a party with several other members of their gang, as well as young women. Defendant, who was a member of the La Posada gang, another subset of the Sureños, was also at the party and had an argument with one of the other partygoers. Ayala and Jauregui intervened and escorted defendant and defendant's friend out of the party. Fighting erupted outside the party, and defendant and his friend fled. Later, defendant and his friend returned to the party, with defendant wielding a metal baseball bat. Fighting again erupted, and Ayala hit defendant in the head with a beer bottle. Someone else stabbed or slashed defendant in the face with a kitchen knife. After getting injured, defendant fled.

Three years later, in 2004, defendant still bore the scars from the 2001 injuries.

August 2004 Ayala Shooting (Uncharged)

In the early morning hours of August 7, 2004, a white car drove up to Ayala's trailer home. Two men got out. They kicked the front door, cocked a gun, then went back to the car and drove down the street. As they turned around and passed the house, an occupant of the car on the passenger side fired four shots, three of which hit the trailer home. Ayala and several other people were inside the trailer home at the time. It was

later determined that the bullets were fired from defendant's .45-caliber handgun.

First Jauregui Shooting (Uncharged)

Also sometime in August 2004, someone shot at the residence of David Jauregui. Seven people were in the residence at the time. A bullet recovered from the residence after this first shooting was fired from defendant's .45-caliber handgun.

October 2004 Ayala Shooting (Charged as Counts 1-7)

On October 10, 2004, Ayala awoke to the sound of gunshots and bullets entering the trailer home. Multiple shots penetrated the walls. Bullets narrowly missed one of Ayala's sisters in a bedroom. Ayala saw the same white car as it drove away. At the time of the shooting, there were at least six people in the trailer home -- Ayala, his wife, his father, and three of his sisters. Nine-millimeter bullets were found at the scene.

October 2004 Jauregui Shooting (Charged as Counts 8-13)

Five nights later, on October 15, 2004, two people in a white Dodge Neon stopped in front of Jauregui's residence, and shots were fired from inside the Neon. Five people were in the residence at the time -- Jauregui, his wife, his two stepdaughters, and his sister. Bullets narrowly missed Jauregui's sister. Jauregui ran outside and fired a gun at the car before it sped off. The bullets and casings found near the residence from the shooting were fired from defendant's nine-millimeter handgun.

Other Evidence

After the shootings in October 2004, defendant fled to Florida.

Defendant's roommate, J.T. Mullins, turned over defendant's .45-caliber and nine-millimeter handguns to the Woodland Police Department.

Defendant's white Dodge Neon was seized on November 10, 2004, and searched. Inside were found three spent nine-millimeter shell casings, which had been fired from defendant's nine-millimeter handgun.

Defendant was arrested in November 2004 when he returned to California from Florida. In his wallet were several articles about gang activities, including the 2001 fight in which defendant was injured. A search of defendant's apartment revealed a newspaper article on the floor of his bedroom about one of the shootings at the Jauregui residence.

Testimony of J.T. Mullins

J.T. Mullins was a roommate of defendant and Perez. He went to the Woodland Police Department to report that he had information concerning the shootings at the Ayala and Jauregui residences.

A few days before the October 2004 shootings at the Ayala trailer home, defendant and Perez went to the trailer park and parked for two or three minutes near the Ayala trailer home. Mullins, on a motorcycle, followed defendant and Perez, who had told Mullins they were going there to look for some girls.

Later, defendant and Perez showed Mullins newspaper articles about the Ayala and Jauregui shootings.

Once, with defendant present, Perez told Mullins about an incident when, a few days previously, Perez and defendant went to a person's house and shot at the house. The person came out of the house and shot back at them. Defendant nodded in agreement with Perez's account.

Police officers recorded several telephone conversations between Mullins and defendant. Defendant asked Mullins if he had "snitched." Defendant also asked Mullins about the "DVD," "VCR," and "toys," which Mullins understood to refer to defendant's handguns that he had left in the residence.

Appellant's Statement

After his arrest, defendant was interviewed at the Woodland Police Department. He admitted that he was a La Posada gang member and that he was injured in a fight in Woodland in 2001. He said that there was a "green light" for the shootings, but that he should have done a walk-up shooting instead of a drive-by shooting because drive-by shootings were prohibited by the Mexican Mafia. Although he did not admit doing the shootings, he said that he did not think he had hit anyone.

Additional facts are recounted as they become relevant to the discussion of the issues raised by defendant.

DISCUSSION

I

Attempted Murder Instruction

Defendant asserts that, by using former CALCRIM No. 600 to instruct the jury concerning concurrent intent as it relates to attempted murder, the trial court improperly permitted the jury to convict defendant of attempted murder without finding an intent to kill (express malice). We conclude that there was no instructional error because it is not reasonably likely that the jury was misled.

A. *Standard of Review for Instructional Error*

When a defendant asserts that a jury instruction is improper, "we evaluate the instructions given as a whole, not in isolation. [Citation.] 'For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.' [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 149, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

B. *Concurrent Intent*

Before discussing the asserted error, we summarize the law regarding concurrent intent.

In *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*), the court explained that "[s]omeone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder -- due to transferred intent -- if the person were killed. To be guilty of attempted murder,

the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Id.* at p. 328.) "[A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the 'kill zone.'" (*Id.* at p. 329.) "This concurrent intent theory is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Id.* at p. 331, fn. 6.)

More recently, the Supreme Court again discussed the concurrent intent theory. (*People v. Stone* (2009) 46 Cal.4th 131 (*Stone*).) "[A] person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific person. One of *Bland*'s kill zone examples involved a bomber who places a bomb on a commercial airplane intending to kill a primary target but ensuring the death of all passengers. We explained that the bomber could be convicted of the attempted murder of all the passengers. (*Bland, supra*, 28 Cal.4th at pp. 329–330.) But a terrorist who

simply wants to kill as many people as possible, and does not know or care who the victims will be, can be just as guilty of attempted murder." (*Stone, supra,* at p. 140.)

C. *Analysis*

Defendant asserts that two parts of the challenged instruction allowed the jury to convict him based on implied malice rather than the required express malice (intent to kill) for attempted murder. First, he claims the trial court erred by stating that the kill zone theory applied if the jury found that defendant intended to kill "anyone" in the kill zone. And second, he claims that the instruction allowed the jury to convict of attempted murder if defendant meant only to harm, not kill, the victim. We conclude that each claim is without merit because it is not reasonably likely that the jury was misled.

1. "Anyone" in Kill Zone

The challenged instruction, which, since defendant's trial, as been changed in the CALCRIM instructions to correct the language defendant asserts was erroneous here, stated, in relevant part, that defendant could be found guilty of attempted murder of people in the kill zone if defendant "intended to kill anyone in the kill zone."[1] To avoid ambiguity, the instruction

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[1] The full text of the challenged instruction is as follows:

"A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Jose Ayala, Maritza Ayala, Cynthia Hernandez, Nancy Ayala, Melina Ayala (Counts Two thorough [*sic*]

should have stated "everyone," not "anyone" in the kill zone. (*Stone, supra,* 46 Cal.4th at p. 138, fn. 3.) However, concerning any ambiguity that might arise from using the word "anyone," the *Stone* court noted: "In context, a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill *any* person who happens to be in the kill zone, i.e., *everyone* in the kill zone. But a possible ambiguity can easily be eliminated by changing the word 'anyone' to 'everyone.'" (*Ibid*, original emphasis.)

As the Supreme Court noted, the jury would not interpret this instruction in context as relieving it from finding an intent to kill as to each victim before finding defendant guilty of attempted murder as to each victim. The instruction concerning the elements of attempted murder made it clear that intent to kill the victim is a prerequisite of an attempted murder conviction. The attempted murder instruction listed, as an element, "[t]he defendant intended to kill *that* person."

Six), the People must prove that the defendant not only intended to kill Victor Ayala (Count One) but also either intended to kill Jose Ayala, Maritza Ayala, Cynthia Hernandez, Nancy Ayala, and Melina Ayala, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Jose Ayala, Maritza Ayala, Cynthia Hernandez, Nancy Ayala, and/or Melina Ayala, or intended to kill Victor Ayala by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Jose Ayala, Maritza Ayala, Cynthia Hernandez, Nancy Ayala, and Melina Ayala."

The instruction repeats the language used but with different names for counts 8 through 12.

(Italics added.) While ambiguous, the use of "anyone" in former CALCRIM No. 600 would have been read in context with the other instructions to mean any person who happened to be in the kill zone.

2. Intent to Harm

Also in former CALCRIM No. 600, as given here, the jury was instructed: "A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of *harm* or 'kill zone.' . . . If you have a reasonable doubt whether the defendant intended to kill [the occupants of the house], or intended to kill [the primary target] by *harming* everyone in the kill zone, then you must find defendant not guilty of the attempted murder . . . ." (Italics added.) Concerning this language about harm rather than killing, the *Stone* court said: "Because the intent required for attempted murder is to kill rather than merely harm, it would be better for the instruction to use the word 'kill' consistently rather than the word 'harm.'" (*Stone, supra,* 46 Cal.4th at p. 138, fn. 3.)

Again, in context, the instruction was not misleading. The jury was instructed that an element of attempted murder is the intent to kill, not merely to harm. "Harm" is a more general term that encompasses killing. Therefore, it was not technically incorrect, just potentially ambiguous. Any such ambiguity was overshadowed by the repeated references to the intent-to-kill element. Hence, it is not reasonably likely that

the jury resolved the potential ambiguity in favor of convicting based on an intent to harm, without finding an intent to kill.

Though not perfect, the instruction did not mislead the jury.

II

"Kill Zone"

In its instructions to the jury, the trial court used the term "kill zone," as it is used in former CALCRIM No. 600, with respect to the attempted murder counts. For example, the court instructed the jury that "[a] person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.'"[2] Defendant states that the term "kill zone" is improperly inflammatory and therefore violated his due process rights. We disagree. It is a non-inflammatory descriptive term that is useful to a jury in determining whether a defendant is guilty of attempted murder.

The "kill zone" paragraph of former CALCRIM No. 600 derives from *People v. Bland, supra,* 28 Cal.4th at pages 329 to 331, 333, and 342. More recently, the Supreme Court again used the term "kill zone" in discussing the concurrent intent theory. (*People v. Stone, supra,* 46 Cal.4th at p. 137-138, 140.)

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[2] As used by the trial court to instruct this jury, former CALCRIM 600 No. continued: "In order to convict the defendant of the attempted murder of [the occupants of the house], the People must prove that the defendant not only intended to kill [the primary target] but also either intended to kill [the occupants of the house], or intended to kill anyone within the kill zone."

Recognizing that the term "kill zone" has been used by the Supreme Court, defendant nonetheless argues that it is not mandatory for the trial court to use the term when instructing the jury and should not use the term because of its inflammatory nature. Contrary to defendant's assertion, the term is not inflammatory.

When instructing the jury concerning attempted murder, the court discussed intent to kill. The court stated the two elements of attempted murder are "at least one direct but ineffective step toward *killing* another person" and "[t]he defendant intended to *kill* that person." (Italics added.) Use of the term "kill zone" related the concurrent intent theory to those elements. In explaining concurrent intent, the term "kill zone" is useful because it describes an area in which the defendant may have intended to kill everyone. Rather than inflame the passions of the jurors, the term helped them understand their duties with respect to a finding of concurrent intent.

Defendant argues that "inclusion of this inflammatory term in the attempted murder instructions suggested that [defendant] was a person of bad character prone to committing violent acts within a lethal territory of his own creation, a 'kill zone.' Arguments or instructions inviting jurors to consider bad character as a basis for conviction violate Due Process." To the contrary, the use of the term "suggested" nothing about defendant. It did not imply that defendant was guilty or that he was "prone to committing violent acts." Defendant overstates

the effect of the language. Instead, the use of the term neutrally helped frame the question of concurrent intent for the jury.

Therefore, defendant's assertion that use of the term "kill zone" was prejudicially inflammatory is without merit.

III

Definition of "Kill Zone"

Defendant contends that the trial court erred by not defining the term "kill zone" in response to the jury's question concerning the term. We conclude that the trial court provided a definition for the term and, in any event, the Supreme Court has held that it is not necessary to define the term.

During its deliberations, the jury sent the trial court a note stating: "What is the legal definition of a kill zone? And is there a numerical value/measurement?"

The trial court responded: "'Kill zone' and 'zone of harm' as used in the [former CALCRIM No.] 600 are synonymous. The phrase 'zone of harm' does not have a particular definition, and should be used in its normal everyday meaning. There is no numerical measure for the size of the zone."

The trial court's response was appropriate and provided as much guidance as the court was able to give.

In any event, the Supreme Court has rejected the contention that "kill zone" has a specialized definition beyond its ordinary meaning. The "kill zone" theory "is not a legal doctrine requiring special jury instructions . . . . Rather, it is simply a reasonable inference the jury may draw in a given

case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Bland, supra,* 28 Cal.4th at p. 331, fn. 6.)

As defendant acknowledges, we are bound by this Supreme Court precedent. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

IV

Admission of Codefendant's Statements

Defendant contends that that trial court violated his rights pursuant to *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476] when it admitted statements made by codefendant Perez. We conclude that, even assuming error, any *Bruton* error was harmless beyond a reasonable doubt. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1128 [*Bruton* error "must be scrutinized under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]"].)

A. *Procedure*

At trial, the court admitted evidence of statements made by codefendant Perez obtained when Mullins, working with police officers, surreptitiously taped a conversation at their residence. Defendant identifies the following statements by Perez as violations of *Bruton*:

1. Defendant did not fear retaliation.

2. Defendant might want Perez to join him in Florida.

3. Perez expected defendant to return from Florida.

4. Concerning possible retaliation, Perez believed that defendant could "handle it."

5. Defendant was injured in a fight several years earlier, sustaining injuries by bottle and knife to his head, eye, and neck.

6. Perez believed that the wounds inflicted on defendant in the earlier fight were improper and were of a type generally reserved for informants and rapists.

7. Mullins should express his concerns about possible retaliation to defendant because it was defendant's problem.

8. Asked what would have happened if the target (Ayala) had come out of the trailer home when they were casing it before the second drive-by shooting at that residence, Perez stated: "We would['ve] dumped on him."

Early in the trial, defendant objected to introduction of the recorded conversations on two separate grounds: (1) they were testimonial and, therefore, under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*), admission of the conversations without the ability to confront and cross-examine Perez would violate the confrontation clause, and (2) Perez's statements constituted inadmissible hearsay and were not declarations against interest. The trial court ruled that Perez's statements were not testimonial and, therefore, admission of the statements would not be contrary to *Crawford*. Concerning the hearsay objection, the court overruled the objection because Perez's statements were, in the court's words, "admissions of interest."

Later in the trial, defendant, through counsel, again objected to admission of the Perez statements. He reiterated

the claim that the statements were testimonial and therefore could not be admitted without the opportunity to cross-examine Perez, but he also said, more generally, that admission of the statements were a violation of his confrontation and due process rights. He specifically objected to Perez's statement about what they would have done if the target individual had come out of the residence while they were casing it ("We would['ve] dumped on him"). He claimed it was speculation. The trial court stated: "[T]he confrontation issue doesn't apply if there's an exception to the hearsay rule." (This statement by the court appears to refer to a discussion of *Bruton* issues in chambers.) The court ruled that the statements were admissible as declarations against interest and that the statement concerning what Perez and defendant would have done was a statement of intent or planning, not speculation.

Although much of the discussion at the trial level involved a *Crawford* objection, defendant does not assert on appeal that admission of the statements violated *Crawford*. Instead, he bases his argument on *Bruton*.

B. Bruton *Error*

The federal and state Constitutions guarantee a criminal defendant the right to confront and cross-examine witnesses against him. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) *Bruton* held that a defendant's Sixth Amendment confrontation rights are violated by the admission of a nontestifying codefendant's confession that implicates the defendant, even if the jury is given a limiting instruction to

disregard the confession when determining the nondeclarant defendant's guilt or innocence. (*Bruton, supra,* 391 U.S. at pp. 135-136.)

C. *Lack of Prejudice*

Bruton error is subject to the beyond-a-reasonable-doubt standard of harmless error set forth in *Chapman v. California, supra,* 386 U.S. 18. *(Harrington v. California* (1969) 395 U.S. 250 [23 L.Ed.2d 284].) "To find the [*Bruton*] error harmless we must find beyond a reasonable doubt that it did not contribute to the verdict, that it was unimportant in relation to everything else the jury considered on the issue in question." (*People v. Song* (2004) 124 Cal.App.4th 973, 984.)

Here any error in admitting Perez's statements was harmless beyond a reasonable doubt. For the most part, Perez's recorded statements concerned peripheral matters, not elements of the offenses. To the extent they can be taken as impliedly admitting elements of the offenses, the statements were cumulative because other evidence was more incriminating to defendant.

Defendant asserts, in particular, that the statement, "[w]e would['ve] dumped on him," was prejudicial because it was "inflammatory" and "attribute[d] homicidal intent to [defendant]." We disagree that the statement was prejudicial. Homicidal intent was better shown by defendant's repeated drive-by shootings. Perez's empty boasting did nothing to enhance the jury's view in that regard.

Defendant also contends the evidence was weak against him because "the reliability of forensic firearms and toolmark comparison evidence has recently come into question." Even if this is true, defendant makes no effort to show that the jury would have doubted the incriminating forensic evidence.

Contrary to defendant's suggestion, this was not a close case. A member of a violent gang, defendant was involved in an earlier altercation with Ayala and Jauregui, in which defendant was injured. Gang culture demanded retaliation. Defendant's car was used. His guns were used. He fled out of state, showing consciousness of guilt. He agreed when Perez told Mullins about the shootings. The manner in which the crimes were committed, shooting into occupied dwellings at night, was strong evidence of express malice. The evidence, even if circumstantial in most regards, strongly pointed to defendant's guilt of the crimes for which he was convicted.

Accordingly, even if the court committed *Bruton* error, any such error was harmless beyond a reasonable doubt.

V

Gang Enhancements

Defendant makes three assertions of error concerning the gang enhancements found true by the jury. He claims that there was insufficient evidence that (1) he committed the crimes for the benefit of a criminal street gang, (2) he committed the crimes with the specific intent to promote, further, or assist a criminal street gang, and (3) the primary activities of the

criminal street gang included those listed in the gang statute. None of these assertions has merit.

A. *Evidence Concerning Gang Enhancements*

The information charged a gang enhancement for each of the 11 attempted murder counts and the two counts of shooting at an inhabited dwelling.

Defendant does not dispute that there was evidence that he was a gang member, associated with the La Posada gang from Salinas, which is a subset of the Sureños. He had several gang tattoos, and he visited with fellow gang members and exchanged stories about their activities. Codefendant Perez was also a La Posada gang member.

Defendant focuses on evidence that the Mexican Mafia, a prison gang that controls the Sureños, prohibited drive-by shootings because such activities cause bad publicity and attract law enforcement attention. Evidence concerning this prohibition came from both the prosecution and defense. The prosecution's gang expert and a defense investigator testified that violations of the prohibition could result in violent punishment. Defendant was aware of the Mexican Mafia edict. The defense investigator gave his opinion that the shootings were committed for personal revenge, not for the benefit of the gang.

Officer Royce Heath, who had been a police officer in Salinas, testified as an expert on the La Posada gang. He stated that, in order to maintain their standing within the gang, gang members must retaliate for acts of violence against

them. It is common for different Sureños gangs to have conflicts amongst themselves. The La Posada gang is known as one of the most violent gangs and is respected by other gangs for its willingness to commit violent acts. Committing violent acts promoted the gang's reputation and enhanced new member recruitment.

Officer Heath testified that Sureños sometimes committed drive-by shootings in violation of the Mexican Mafia edict. The drive-by shootings benefitted the gang by showing that the gang members would retaliate for perceived slights, such as the injuries inflicted on defendant in 2001. The shootings promoted the gang by showing that it is willing to commit violent acts, thus causing others to fear and respect the gang. Such violence dissuades victims from cooperating with authorities.

Officer Heath testified concerning the primary activities of the La Posada gang, in addition to the four drive-by shootings by defendant, two charged and two uncharged, about which evidence was presented in this case. He stated that the La Posada gang's primary activities included murders, attempted murders, assaults with deadly weapons, robberies, and vehicle theft. He based this testimony on his personal investigation of crimes committed by La Posada gang members and from his review of police reports concerning those crimes. He personally witnessed a La Posada gang member walk up to and shoot a Norteño gang member. Officer Heath was aware of a incident in which La Posada gang members fired automatic weapons at members of another gang, seriously injuring some of the other gang members.

Finally, the prosecution introduced evidence of a prior court case in which a La Posada gang member pled guilty to assault with a deadly weapon against a rival gang member.

The jury found the gang enhancement true as to each count.

B. *Analysis*

"Where there is a claim of insufficient evidence, 'we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.] 'Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict" the conviction will not be reversed. [Citation.]' [Citation.] We apply the same standard to convictions based largely on circumstantial evidence. [Citation.]" (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1329.)

1. Benefit of a Criminal Street Gang

Penal Code section 186.22, subdivision (b)(1), provides for a sentence enhancement when the defendant "is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Under the statute, there are three main elements of this gang enhancement, namely, that the crime was

(1) "committed for the benefit of, at the direction of, or in association with" (2) "any criminal street gang," as defined by the statute, and (3) the defendant committed the crime "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (Pen. Code, § 186.22, subd. (b)(1).)

"In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs. [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.)

Defendant contends that, because the Mexican Mafia had an edict prohibiting drive-by shootings, there was insufficient evidence that defendant's crimes were committed for the benefit of, at the direction of, or in association with the La Posada gang. The contention is without merit. The prosecution introduced evidence, in the form of expert testimony, that, despite the Mexican Mafia edict, drive-by shootings are carried out for the benefit of the gang. Such shootings helped to maintain the respect and fear associated with the gang. Accordingly, the evidence was sufficient to establish that defendant's crimes were committed for the benefit of a criminal street gang.

2. Intent to Promote, Further, or Assist Gang

In a related contention, defendant asserts that there was insufficient evidence that he committed the crimes with the specific intent to promote, further, or assist in conduct by gang members. Specifically, he claims that "[n]either the gang expert's testimony nor any other evidence presented during trial

established that [defendant] specifically intended the charged offenses to further other criminal conduct by members of his alleged gang."

On the contrary, the jury could draw reasonable inferences that defendant committed the crimes with the specific intent to promote, further, or assist in criminal conduct of gang members. As a member of the La Posada gang, defendant had been attacked and scarred by members of another gang. Defendant's retaliation fed the prominence of the La Posada gang, thus empowering the La Posada gang to further intimidate and oppress other individuals and gangs, as a result of its reputation as a violent and vengeful gang. Defendant was proud of his gang status and aware of the importance of violence to his gang's reputation. Therefore, it was reasonable for the jury to infer that he specifically intended his actions to promote, further, or assist criminal conduct of La Posada gang members.

3. Primary Activities

Finally, defendant contends that the evidence was insufficient to establish that La Posada was a criminal street gang for the purpose of applying the gang enhancement statute. He asserts that the prosecution failed to prove the "primary activities" element. We disagree.

To be recognized as a "criminal street gang," for the purpose of an enhancement for commission of an offense for the benefit of a criminal street gang, a group must engage in, as one of its primary activities, one of the felonies specified in Penal Code section 186.22, subdivision (e). (Pen. Code,

§ 186.22, subd. (f).)[3] Those specified felonies include, among others, assault with a deadly weapon, robbery, unlawful homicide, and shooting at an inhabited dwelling. (Pen. Code, § 186.22, subd. (e).)

To satisfy the primary activities element of the gang statute, the prosecution must establish that the listed crimes are among the gang's chief or principal activities. This can be proven with evidence that the gang consistently and repeatedly committed the crimes. Expert testimony that a gang is primarily engaged in the specified crimes is sufficient to satisfy the primary activities element. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.)

"[B]ecause the culture and habits of gangs are matters which are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact' (Evid. Code, § 801, subd. (a)), opinion testimony from a gang expert, subject to the limitations applicable to expert testimony generally, is proper. [Citation.] Such an expert -- like other experts -- may give opinion testimony that is based upon

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[3] Penal Code section 186.22, subdivision (f) provides the definition of "criminal street gang": "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

hearsay, including conversations with gang members as well as with the defendant. [Citations.] Such opinions may also be based upon the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues or from other law enforcement agencies. [Citations.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.)

Here, the evidence was sufficient to show that the listed crimes were among the La Posada gang's primary activities. In addition to the evidence of defendant's drive-by shootings, the prosecution introduced evidence that another gang member had pled guilty to assault with a deadly weapon and still another had committed a walk-up shooting. Also, Officer Heath reported that, based on his own investigation and reading other police reports, the La Posada gang's primary activities included murders, attempted murders, assaults with deadly weapons, robberies, and vehicle theft. This evidence of a consistent pattern of criminal acts included in the primary activities list established that these violent crimes were the La Posada gang's primary activities.

VI

Accomplice Instructions

Defendant contends that the trial court erred by not instructing the jury, sua sponte, that codefendant Perez's statements introduced at trial were subject to accomplice corroboration and cautionary rules. He asserts that this error

violated his federal due process rights. We conclude that the trial court did not err.

As noted above, Perez's statements introduced at trial were made to Mullins while Mullins was working under the direction of police officers to obtain information concerning the crimes. There is no evidence that Perez suspected that Mullins was assisting the police.

"When the evidence at trial would warrant the jury in concluding that a witness was an accomplice of the defendant in the crime or crimes for which the defendant is on trial, the trial court must instruct the jury to determine if the witness was an accomplice. . . . [T]he jury [i]s to be instructed . . . that the testimony of an accomplice is to be viewed with distrust and that the defendant may not be convicted on the basis of an accomplice's testimony unless it is corroborated. [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271, fn. omitted.) Ordinarily, if accomplice testimony instructions are warranted at all, they must be given sua sponte. (*People v. Box* (2000) 23 Cal.4th 1153, 1208, overruled on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 11.)

"The rationale for instructing a jury to view with caution an accomplice's testimony that incriminates the defendant is the accomplice's self-interest in shifting blame to the defendant. [Citation.]" (*People v. Cook* (2006) 39 Cal.4th 566, 601.) Thus, in this context, "'"testimony" . . . includes . . . all out-of-court statements of accomplices and coconspirators used

as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police.' [Citation.] 'On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as "testimony" . . . .' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 245, quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218 (*Jeffery*).) In *Jeffery*, for example, we concluded that the statements of an accomplice made to an undercover officer were not made under suspect circumstances and therefore were not "testimony" within the meaning of Penal Code section 1111. (*Jeffery, supra,* 37 Cal.App.4th at p. 218.)

Here, Perez's statements were not made under suspect circumstances. They were made in conversations with Mullins, who was a roommate. Perez did not suspect that Mullins was working under the direction of the police to obtain information. This is essentially the same set of facts under which we found in *Jeffery* that there is no duty to instruct the jury concerning accomplice corroboration and cautionary rules.

Accordingly, defendant's contention that the trial court erred and violated his federal due process rights by not instructing the jury concerning accomplice corroboration and cautionary rules is without merit.

VII

Presentence Custody Credits

At sentencing, the trial court gave defendant presentence custody credit for 1,464 days, including 1,274 actual days and 190 days of conduct credit. Defendant contends he is entitled to one additional day of conduct credit. We agree, as does the Attorney General.

Defendant was entitled to presentence conduct credits limited to 15 percent of the actual number of days in custody. (Pen. Code, § 1237.1; *People v. Duran* (1998) 67 Cal.App.4th 267, 270.) He was in custody 1,274 days; therefore, he is entitled to 191 days of conduct credit -- one more day than the court awarded. The judgment must be modified to reflect the additional day of credit.

VIII

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he was required to register as a sex offender, committed for a serious or violent felony, and/or had a prior conviction(s) for a serious or violent felony. (Pen. Code, § 4019, subds. (b)(1), (2) & (c)(1), (2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The award of presentence credit is modified to 1,465 days. As modified, the judgment is affirmed. The trial court is

directed to prepare an amended abstract of judgment and to send a copy to the Department of Corrections and Rehabilitation.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.